own costs. The deposit to be refunded to the plaintiffs.

Appeal and cross-appeal allowed.

Solicitors: *Skinner Lind Robertson Willie Wong & Chin; William Liaw Chan & Co.*

CHUNG KHIAW BANK LTD. v. HIPPARION (M) SDN. BHD.

[O.C.J. (Edgar Joseph Jr. J.) January 11, 1988]

[Penang – Originating Summons No. 31-91-86]

Land Law – Loan agreement – Deed of assignment – Whether deed of assignment a security relating to land or a security relating to a chose in action – Whether deed of assignment is absolute or by way of charge – National Land Code, ss. 205, 206(3) & 257 – Specific Relief Act 1950, s. 41 – R.H.C. 1980, O. 31 r. 1(1).

Contract – Loan agreement – Deed of assignment – Defendant to remain in possession as contractual licensee – Contractual licensee – Whether deed of assignment is absolute or by way of charge – National Land Code, ss. 205 & 206(3) – Specific Relief Act 1950, s. 41 – R.H.C. 1980, O. 31 r. 1(1).

Companies and Corporations – Absolute assignment – No registration required – Companies Act 1965, s. 108.

The plaintiff, a licensed bank, entered into an agreement ("the loan agreement") with the defendant, an incorporated company, whereby the plaintiff granted a loan ("the loan") to the defendant, repayable with interest. By way of security for the loan, the defendant executed a deed of assignment ("the assignment") whereby it assigned absolutely to the plaintiff all its rights, title and interest in certain immovable property ("the property") and in the sale and purchase agreement. It was further provided in the loan agreement that the defendant would remain in possession of the property only as contractual licensee of the plaintiff and that within seven days after its licence to occupy the property has been terminated, it would have to give immediate vacant possession thereof to the plaintiff, and thereafter the plaintiff would have the right to enter upon the property and to deal with all its rights, title and interest in the property. The defendant defaulted in making payments due under the loan agreement, in consequence whereof the plaintiff, after notification to the defendant, commenced the proceedings herein by way of originating summons praying for *inter alia*, an order for sale of the property.

Held, applying contractual principles to determine the rights and obligations of the parties: (1) the defendant's right to possession of the property *vis-a-vis* the developer is an incident of his rights and benefits under the sale and purchase agreement (under which the defendant was the purchaser and the developer the vendor), which right had been assigned to the plaintiff under the assignment;

(2) the defendant's rights to possession subsequent to the execution of the assignment depended entirely upon the contractual licence granted to him by the plaintiff;

(3) the plaintiff had lawfully exercised its right to terminate the licence and was entitled to enter upon the property and to deal with all the rights, title and interest in the property.

(4) if the security constituted by the documents concerned is a security relating to land, it is still a valid security. The requirements of the National Land Code, which concern the creation of a security in respect of land held under registered title, are without application in the present case, as the property is not as yet held under a registered title.

(5) the security concerned, being a security relating to a chose in action, that is to say, an assignment of the defendant's rights, benefits and interest in and under the sale agreement of the property, to wit, a parcel of a sub-divided building, in respect of which strata title has yet to be issued, this court has jurisdiction under section 41 of the Specific Relief Act 1950 and/or it has inherent jurisdiction to grant the declaration prayed for by the plaintiff and an order for sale of the property;

(6) if the security herein is not a security relating to a chose in action, but a security relating to land, then the court would hold that it has jurisdiction under Order 31 rule 1(1) of the Rules of High Court 1980 to make an order for sale of the property.

Cases referred to:

(1) *Nouvau Mont Dor (M) Sdn. Bhd.* v. *Faber Development Sdn. Bhd.* [1984] 2 M.L.J. 268 (refd).
(2) *Hughes* v. *Pump House Hotel Co. Ltd.* [1902] 2 K.B. 190 (refd).
(3) *Comfort* v. *Betts* [1891] 1 Q.B. 737 (folld).
(4) *Tancred and Others* v. *Delagoa Bay and East Africa Railway Co.* (1889) 23 Q.B.D. 239 (folld).
(5) *Durham Brothers* v. *Robertson* (1898) 1 Q.B. 765 (folld).
(6) *National Provincial Bank* v. *Harle* (1881) 6 Q.B.D. 626 (refd).
(7) *Oldham* v. *Stringer* (1885) 51 L.T. 895 (cited).

ORIGINATING SUMMONS.

Louis Van Buerle (*Miss Lim Seong Lee* with him) for the plaintiff.

Charles Ong for the defendant.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: This is yet another one of those cases where a borrower is attempting to avoid repayment of money he has borrowed on purely technical grounds. However, as I have said before, this is not a court of morals but a court of law and so if the borrower is right in its contentions, then it is entitled to succeed.

The material facts are contained in various contemporary documents executed by the parties and so are not in dispute. They may be shortly stated thus.

On September 3, 1983, the plaintiff, a licensed bank, entered into an agreement in writing ("the loan agreement") with the defendant, an incorporated company, whereby the plaintiff granted a loan of (ringgit) $1 million ("the loan") to the defendant repayable with interest thereon at the rate of 13.5% p.a. or at such rate as the plaintiff may specify, from time to time, in accordance with the terms and conditions specified therein.

By way of security for the loan and contemporaneously with the loan agreement, the defendant also executed a deed of assignment dated September 3, 1983 ("the assignment") whereby it assigned *absolutely* to the plaintiff all its right, title and interest in certain immovable property known as the third floor of a building standing on Holding 355, Town Subdivision 14, North East District, Penang ("the property") and in the sale and purchase agreement dated April 13, 1981 ("the sale agreement") in respect thereof and the full benefit and advantage thereunder.

It was further provided in the loan agreement that the defendant would remain in possession of the property only as a contractual licensee of the plaintiff (clause 1(iii)) and that within seven days after its licence to occupy the property has been terminated, it would have to give immediate vacant possession thereof to the plaintiff or such other person as the plaintiff might direct (clause 3).

It was also provided in the loan agreement that in the event of default being made by the defendant in the payment of any one or more of the instalment payments covenanted to be made in the manner provided, the plaintiff was to be at liberty to demand immediate payment of the balance and in the event of any part of the same remaining unpaid after fourteen days from the date of such demand, the plaintiff would have the right to terminate the licence of the defendant granted under clause 1(iii) by notice in writing and to enter upon the property and to deal with all its right, title and interest or the registration of the plaintiff, as owner thereof, in all respects as the person absolutely and beneficially entitled thereto, including the right and power to assign or to sell or to transfer such right, title and interest at such price and in such manner and subject to such conditions as the plaintiff shall in its absolute discretion deem fit free from any interest of the defendant (clause 12(a)).

In the events which transpired, the defendant defaulted in making payments due under the loan agreement, in consequence whereof the plaintiff, through its solicitors, caused to be issued a notice in writing on August 14, 1985 demanding repayment of the loan together with accrued interest thereon within 14 days from the date of demand.

The plaintiff, through their solicitors, further caused to be issued another notice in writing on August 30, 1985 pursuant to clause 12 of the loan agreement stating that if its demand for payment aforesaid was not complied with, it would exercise its rights of sale over the property.

The plaintiff, through their solicitors, also caused to be issued yet another notice in writing on August 30, 1985 stating that if its demand for payment aforesaid was not complied with, then the defendant was to quit, vacate and yield vacant possession of the property, failing which ejectment proceedings would be instituted without further reference.

In the upshot, the plaintiff commenced the proceedings herein by way of originating summons praying for:

(a) a declaration that the sum due and owing by the defendant abovenamed to the plaintiff under the abovementioned loan agreement as at July 31, 1985 is $1,072,013.17 for principal and interest and further interest continues to accrue thereon at the rate of 14% per annum from August 1, 1985 is also due from the defendant abovenamed till date of payment;

(b) an order that the defendant do quit and deliver vacant possession of premises known as third floor of a building built on Holding 355, Town Subdivision 14, North East District, Penang within seven (7) days from date of service of the order herein;

(c) an order that the plaintiff abovenamed may be at liberty to sell by public auction and/or by private treaty the above described premises known as third floor of a building built on Holding 355, Town Subdivision 14, North East District, Penang, so charged to the plaintiff abovenamed under the abovementioned loan agreement and deed of subject assignment sub-

ject, however, to a reserve price with liberty to the plaintiff abovenamed to bid at such sale by the default of the defendant abovenamed in the payment of the principal sum and interest due and owing to the plaintiff abovenamed under the abovementioned loan agreement and deed of assignment on a date to be fixed by the plaintiff;

(d) that upon such sale being completed, the net proceeds of sale be applied towards payment of what is declared due to the plaintiff abovenamed for the principal and interest under the abovementioned loan agreement and deed of assignment and the costs herein and if there be any surplus monies, such surplus be paid over to the defendant abovenamed;

(e) that the plaintiff's solicitors costs of and incidental to this application and of the sale be taxed and paid out of the proceeds of the said sale.

It was submitted by counsel for the defendant that the plaintiff was seeking by the present proceedings to enforce a security for repayment of a loan. Accordingly, the security documents concerned could be construed either as a security relating to land or a security relating to a chose in action.

If it was a security relating to land, then it had to take the form prescribed by the National Land Code; that is to say, by way of charge or by way of a lien holder's caveat. There was no question here of a lien holder's caveat because there was no deposit of the title deed.

Furthermore, if the security documents were construed as a security relating to land, then they could only be by way of charge so that the plaintiff cannot claim a beneficial interest in the land and vacant possession thereof. The plaintiff's remedies would thus be restricted to orders of court under section 257 of the National Land Code and the sale, if there was to be one, would have to be by way of a judicial sale by public auction. Moreover, the documents were not in the form prescribed by the National Land Code. Accordingly, the plaintiff's claim must be dismissed with costs.

It was then submitted, by way of alternative, that at best, the security interest created by the assignment and the loan agreement was a security over a chose in action. So construed, it could not be denied that the assignment was created by way of charge only as opposed to an absolute assignment. To emphasize the point, counsel drew the attention of the court to the fact that the loan agreement and the assignment had been registered with the Registrar of Companies under section 108 of the Companies Act 1965, which provides for the registration of charges. Accordingly, it was not open to the plaintiff to now claim any beneficical interest. Furthermore, an absolute assignment does not require registration under section 108 of the Companies Act 1965, as was the case here.

In response to the submissions of counsel for the defendant, counsel for the plaintiff advanced the following arguments.

Firstly, he contended that whether or not an assignment is absolute or by way of charge only within the meaning of section 4(3) of the Civil Law Act 1956 was to be gathered from within the four walls of the document concerned: see *Nouvau Mont Dor (M) Sdn. Bhd.* v. *Faber Development Sdn. Bhd.*.[1]

Secondly, he contended, that so construed, there was no escape from the conclusion that the assignment was absolute, whereby all the defendant's rights, benefits and interest in the property had passed to the plaintiff, albeit by way of security: see *Hughes* v. *Pump House Hotel Co. Ltd.*[2] cited by Seah F.J. (as he then was) with approval in the *Nouvau Mont Dor's* case[1] at pp. 269 and 270. In particular, the security in this case was a security relating to a chose in action, being an assignment of the defendant's rights, benefits and interest in the property and under the sale and purchase agreement of the property, being a parcel of a subdivided building, in respect of which strata titles are yet to be issued. Accordingly, the security relating as it does to a chose in action, the provisions of the National Land Code are without application. It follows, therefore, that the relative rights of the assignor (the defendant) and the assignee (the plaintiff) must be governed by contractual principles.

I have no hesitation in upholding the submissions of counsel for the plaintiff.

Therefore, applying contractual principles to determine the rights and obligations of the parties, I also have no hesitation in arriving at the following conclusions.

The defendant's right to possession of the property *vis-a-vis* the developer is an incident of his

rights and benefits under the sale and purchase agreement (under which the defendant was the purchaser and the developer the vendor), which right had been assigned to the plaintiff under the assignment. Thereafter, the defendant's right to possession subsequent to the execution of the assignment depended entirely upon the contractual licence granted to him by the plaintiff. As has already been noted by clause 12(a) of the loan agreement, the plaintiff was entitled by written notice to terminate such licence in the event of default by the defendant in making the payment specified therein. There having been such default by the defendant – and as to this there never has been any dispute – the plaintiff had lawfully exercised its right to terminate the licence and, in the words of the loan agreement, was entitled "to enter upon" the property "and to deal with all the right, title and interest of the bank in relation to or in, as the case may be" the property "arising out of the beneficial ownership by the bank of" the property "or the registration of the bank as the owner of" the property "or, otherwise, in all respects as the person absolutely and beneficially entitled thereto..."

If, on the other hand, the security constituted by the documents concerned is a security relating to land, it is still a valid security. The requirements of the National Land Code, which concern the creation of a security in respect of land held under registered title, are without application in the present case, as the property is not as yet held under a registered title. In this context, section 205[(1)] of the National Land Code is relevant and provides as follows:

"The dealings capable of being effected under this Act with respect to alienated lands and interest therein shall be those specified in Parts Fourteen to Seventeen and no others."

For the definition of the expression "alienated land", I would refer to section 5 of the National Land Code which describes "alienated land" as "any land (including any parcel of subdivided building) in respect of which a registered title for the time being subsists". Then, section 206(3) of the National Land Code serves to remind us that "nothing in sub-section (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein". It follows, therefore, that the defendant's submission that a claim to enforce a security given by way of assignment cannot put the claimant in a better position than one who seeks to enforce a charge registered as a Form 16 charge under the National Land Code is untenable.

Looking back, I would hold that the assignment was not by way of charge only but an absolute assignment. The letter of offer dated August 9, 1983, exhibited to the affidavits of Cheah Ah Bee, the secretary of the defendant, affirmed to on March 25, 1987 (enclosure 12) and the charge in escrow referred to in the letter of offer merely demonstrated that the assignment was by way of security designed to give the defendant an equitable right of reassignment upon repayment of the loan secured thereby. It has been settled by plentiful authority that an assignment in such circumstances is nonetheless absolute. I need no more than refer to three of these and they are as follows.

In *Comfort* v. *Betts*,[3] Fry L.J. said, *inter alia*, at p. 740:

"The question is whether the instrument now in question is an absolute assignment, not purporting to be by way of charge only. The instrument clearly purports, and is intended in point of form, to be an absolute assignment, because the word 'absolutely' is used in it: and, although it is true that a trust is constituted by it in respect of moneys recovered under it by the assignee, nevertheless the intention of the parties clearly is that it shall be absolute in the sense that the assignee shall have all the rights given by the 6th sub-section of the 25th section of the Judicature Act 1873. Therefore, not only is the instrument an absolute assignment in point of form; but the intention of the parties is that it shall operate as such."

In *Tancred and Others* v. *Delagoa Bay and East Africa Railway Co.*,[4] Denman J. said, *inter alia*, at p. 242:

"Now the document in this case does not appear to us to purport to be 'by way of charge only', either expressly or by necessary inference from its provisions, within the meaning of the section; it is an absolute assignment of the debt; a document given 'by way of charge' is not one which absolutely transfers the property with a condition for re-conveyance, but is a document which only gives a right to payment out of a particular fund or particular property, without transferring that fund or property."

And further down on the same page he said this:

"We therefore decide that this assignment is an absolute assignment within sub-section 6, and does not purport 'to be by way of charge only', and that the proviso for re-conveyance does not prevent it from being absolute, or make it purport to be by way of charge only."

In *Durham Brothers* v. *Robertson*,[5] Chitty L.J. said, *inter alia*, at p. 771:

"To bring a case within the sub-section transferring the legal right to sue for the debt and empowering the assignee to give a good discharge for the debt, there must be (in the language of the sub-section) an absolute assignment not purporting to be by way of charge only. It is requisite that

the assignment should be, or at all events purport to be, absolute, but it will not suffice if the assignment purport to be by way of charge only. It is plain that every equitable assignment in the wide sense of the term as used in equity is not within the enactment. As the enactment requires that the assignment should be absolute, the question arose whether a mortgage, in the proper sense of the term, and as now generally understood, was within the enactment. In *Tancred* v. *Delagoa Bay and East Africa Railway*(4) there was an assignment of the debt to secure advances with a proviso for redemption and reassignment upon repayment. It was there held by the Divisional Court (disapproving of a decision in *National Provincial Bank* v. *Harle*(6)) that such a mortgage fell within the enactment. It appears to me that the decision of the Divisional Court was quite right. The assignment of the debt was absolute: it purported to pass the entire interest of the assignor in the debt to the mortgageee, and it was not an assignment purporting to be by way of charge only. The mortgagor-assignor had a right to redeem, and on repayment of the advances a right to have the assigned debt reassigned to him. Notice of the reassignment pursuant to the sub-section would be given to the original debtor, and he would thus know with certainty in whom the legal right to sue him was vested. I think that the principle of the decision ought not to be confined to the case where there is an express provision for reassignment. Where there is an absolute assignment of the debt, but by way of security, equity would imply a right to a reassignment on redemption, and the sub-section would apply to the case of such an absolute assignment."

Accordingly, the security concerned, being a security relating to a chose in action, that is to say, an assignment of the defendant's rights, benefits and interest in and under the sale agreement of the property, to wit, a parcel of a subdivided building, strata title, in respect of which is yet to be issued, this court has jurisdiction under section 41 of the Specific Relief Act 1950 and/or it has inherent jurisdiction to grant the declaration prayed for by the plaintiff and an order for sale of the property consequential thereto.

If, contrary to my primary opinion, the security herein is not a security relating to a chose in action but a security relating to land, then I would hold that this court has jurisdiction under Order 31 rule 1(1) of the Rules of High Court 1980 (adapted from Order 51 of the English Rules of the Supreme Court 1965) to make an order for sale of the property: see *Oldham* v. *Stringer*.(7)

The plaintiff is, therefore, entitled to all the reliefs prayed for in the originating summons and I make the orders prayed for accordingly.

Order accordingly.

Solicitors: *Cheong Wai Meng & Van Buerle; Jayaraman Ong & Co.*

HASHIM BIN PAWANCHEE & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Mohamed Dzaiddin J.) November 27 & December 1, 1987]

[Penang – Criminal Appeal No. 51-42-87]

Criminal Procedure – Sentence – Whether sentence was manifestly excessive and unreasonable – Whether factors in favour of accused considered – Whether sentences should run concurrently or consecutively – Discretion of magistrate – Criminal Procedure Code (F.M.S. Cap. 6), s. 171(A)(i).

The two appellants in this case were charged and convicted for six offences under the Penal Code. The six offences were under section 471 and section 403 of the Penal Code. Both appellants pleaded guilty.

Before sentence was passed, the respondent tendered about 112 outstanding offences amounting to a total of 56 charges under section 171(A)(i) of the Criminal Procedure Code. After considering the mitigating factors, both appellants were sentenced to 14 months' imprisonment for each of the six charges and the sentences were to run consecutively. Both appellants appealed against their sentences.

Held, allowing the appeal: (1) the learned magistrate had taken the outstanding offences into consideration in favour of the appellants and had also taken into consideration factors which were in favour of the appellants;

(2) the restitution of money by Bank Bumiputra Malaysia Bhd. could not be a mitigating factor. It was a separate exercise agreed to between the bank and the Tunku;

(3) it was within the discretion of the learned magistrate to pass a consecutive sentence. However, bearing in mind all the mitigating factors (the plea of guilty, first offenders, the outstanding offences agreed to be taken into consideration and, most important of all, that the maximum term of imprisonment for each offence was two years), a sentence of 14 months' imprisonment was manifestly excessive and unreasonable. An appropriate or fair punishment for each offence would be one year's imprisonment;

(4) the decision of the learned magistrate in ordering the sentence to run consecutively was not wrong in principle having regard to the offences and the totality of the sentences.

Cases referred to:

(1) *Zafaruddin bin Abdul Rahman* v. *Public Prosecutor* Penang Criminal Appeals No. 11 of 1986 and 17 of 1986 (unreported) (refd).
(2) *R.* v. *Cutbush* (1867) L.R. 2 Q.B. 329 (refd).
(3) *Marimuthu Balikrishnan* v. *Public Prosecutor* [1974] 2 M.L.J. 145 (refd).

CRIMINAL APPEAL.

Yeap Chye Choon for the appellants.

Mohamed Bazain bin Idris (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.